(2)

No. 99-1026

In The

Supreme Court of the United States

MAJOR BANKS, *ET AL.*,

Petitioners,

VERSUS

NEW YORK LIFE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court, State Of Louisiana

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Petitioners did not make any argument based on the federal Full Faith and Credit Clause before the Louisiana trial court, in their briefs to the Louisiana First Circuit Court of Appeals, or in their original application or briefs to the Louisiana Supreme Court. It was not until an application for a second rehearing before the Louisiana Supreme Court that petitioners raised a federal full faith and credit issue. None of the state courts addressed or mentioned any purported full faith and credit argument. In these circumstances, was the federal full faith and credit issue sufficiently raised in or addressed by the state courts to support this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a)?

B. In 1995, a New York state court, in light of the terms of a settlement between the parties and applying New York procedural law as it was then construed, certified a nationwide settlement class in a proceeding brought against New York Life Insurance Company. As a provision of the settlement, New York Life Insurance Company did not contest certification. Petitioners here opted out of the New York state court proceeding, and filed a separate suit against New York Life Insurance Company in Louisiana state court seeking certification pursuant to Louisiana procedural law of a class of Louisiana residents. Does the Full Faith and Credit Clause of the United States Constitution require the Louisiana Supreme Court to accord the New York state court's certification of a settlement class, made pursuant to New York procedural law and without actually being litigated,

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with the effect of precluding a different certification result in this Louisiana state court case involving different plaintiffs and applying Louisiana procedural law to a contested non-settlement class?

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STATEMENT OF THE CASE

This class action against New York Life Insurance Company ("New York Life") was brought by petitioners on the heels of previously filed and consolidated nationwide class actions against New York Life pending in New York state court, *sub nomine Willson v. New York Life Ins. Co.* (Sup. Ct. N.Y. Co., Index No. 94/127804) (hereinafter "*Willson*"). Plaintiffs' assertion that the *Willson* court's certification of a settlement class under New York procedural law, from which these plaintiffs opted out, is *res judicata* and commands certification of a contested non-settlement class under Louisiana procedural law is not worthy of the exercise of this Court's discretionary review, and does not satisfy any of the considerations enunciated in Rule 10 of the Rules of this Court.

A. The *Willson* Case

Willson was a consolidation of four separate nationwide class actions against New York Life filed in New York state court in 1994 and 1995. [Petition Appendix E2 at ¶ 1].[1] On July 28, 1995, the parties in *Willson* executed a stipulation of settlement which provided various forms of relief for class members, depending on the type of policy owned, with an estimated value exceeding $250 million. In addition, New York Life waived certain defenses, such as statutes of limitations defenses, and agreed to provide certain relief to class members without a showing of fault, injury or damage, all of which would likely have

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[1] "Petition Appendix ___" refers to the appendices attached to and filed with plaintiffs' Petition for Writ of *Certiorari*.

destroyed the predominance of common issues had the case proceeded to trial. [Petition Appendix E16-17 at ¶ 26]. Furthermore, an alternative dispute resolution component of the settlement, by which claims of misrepresentation and fraud would be decided on an individual basis for each class member rather than on a classwide basis, enabled such claims to be "resolved by means of a fast, efficient, fair and cost-free mechanism that avoids the time and expense of both individual litigation and the individual mini-trials on causation, reliance and damages that would likely be required were this action to proceed in litigation." [Petition Appendix E49-50 at ¶ 61].

After due notice and a fairness hearing, the *Willson* trial court entered "Findings of Fact, Conclusions of Law, and Final Order and Judgment," [Petition Appendix E], in which it concluded that the New York procedural requirements for class certification had been met as a result of the settlement terms. In the words of the court, "common issues of law and fact predominate *in light of the ADR Process included in the settlement . . . .* " [Petition Appendix E19-20 at ¶ 29 (b)(ii) (emphasis supplied)]. Adequacy of the *Willson* class representatives was satisfied by "the combination of the individualized ADR Process and the no-fault Class Relief benefits [which] accommodates much better than class actions are usually able to any variations between Class Members." [*Id.*, E23 at ¶ 29(d)(iii)]. Even superiority was satisfied because of the settlement: "The Court finds that, *given the proposed settlement,* a class action is clearly superior to other methods for the fair and efficient adjudication of this controversy." [*Id.* at ¶ 29(e) (emphasis supplied)]. In short: *"Given the settlement, and specifically its Alternative*

Dispute Resolution component, the Court finds that the requirements of CPLR 901 and 902 are satisfied by this settlement Class and therefore finally certifies the settlement Class." [Petition Appendix E24 at ¶ 31 (emphasis supplied)]. The judgment was affirmed on appeal. *Willson v. New York Life Ins. Co.*, 228 A.D. 2d 368, 644 N.Y.S. 2d 617 (N.Y. App. 1996). Significantly, New York Life did not oppose certification in the context of the settlement.[2]

B. The *Speaks* Case

After notification of the proposed *Willson* settlement and during the period afforded putative class members to opt out, a purported class action suit was filed in a Louisiana state court on behalf of Louisiana policyholders, in the matter entitled *Speaks v. New York Life Insurance Co.*, No. 95-12441 in the Civil District Court for the Parish of Orleans. Because all plaintiffs in *Speaks* had not opted out of *Willson*, however, New York Life sought a stay of *Speaks* in deference to *Willson*. The *Speaks* court granted the stay as to those *Speaks* plaintiffs who had not opted out of *Willson*, but permitted *Willson* opt-outs to proceed. [*Speaks* Stay Order, Petition Appendix F4].

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[2] Plaintiffs indicate that New York Life has taken contrary positions, opposing certification in Louisiana while arguing in favor of certification in New York. *See* Petition for Writ of *Certiorari* at 6, 19, 24. In fact, New York Life has advanced no contrary positions. It did not argue in favor of or take any position as to certification of a settlement class under New York law, and it has contested certification of a non-settlement class under Louisiana law.

Speaks, which did not involve any of the named plaintiffs here, later was voluntarily dismissed.

C. The *Banks* Case

Shortly after the granting of a partial stay in *Speaks*, plaintiffs filed the instant action on behalf of only Louisiana residents who had opted out of *Willson*. The putative class consisted of Louisiana residents who purchased approximately 1849 life insurance policies from among 1000 New York Life agents in different transactions over a thirteen-year period between January 1, 1982 and December 31, 1994. Petitioners contended that New York Life, through independent agents, misrepresented the nature of life insurance products to each class member and improperly encouraged some class members to replace pre-existing coverage. Petitioners claimed that New York Life was liable to each class member for fraud, negligent misrepresentation, negligence, breach of the duty of good faith and fair dealing, and breach of contract.

In the trial court, petitioners and New York Life vigorously contested the propriety of class treatment under Louisiana law. At the certification hearing, New York Life offered deposition transcripts from each of the class representatives, testimony from New York Life representatives, and substantial documentary evidence. This evidence demonstrated that petitioners' claims rested upon highly individualized alleged oral and written misrepresentations and were susceptible to a wide range of individual affirmative defenses, including several dependent upon a variety of circumstances unique to each class

member. Petitioners in turn sought to minimize the myriad individualized issues, arguing that the "common thread" of New York Life's alleged conduct created sufficient "common character" to support certification under Louisiana law.

Plaintiffs did not use the words "full faith and credit" in their pleadings or briefs before the Louisiana trial court, nor did they raise any purported federal constitutional issue. The trial court addressed no such issue in its order certifying a class. Instead, the court concluded that the requisite "common character" existed based upon the alleged conduct of New York Life, but it failed to take into account all of the individualized issues unique to each class member, or to address how such issues could be managed on a classwide basis. New York Life appealed.

Before the appellate court, petitioners raised the *Willson* certification, but only in their brief in support of rehearing. [Plaintiffs'/Appellees' Brief in Support of Motion for Rehearing *en banc* at 9-11]. Even then, they made no federal full faith and credit argument, instead merely tossing out the phrase "full faith and credit" in their argument regarding comity. *Id.* Plaintiffs did not cite to the United States Constitution or to any other federal authority in support of that argument. The Louisiana First Circuit Court of Appeals, like the trial court, did not address any purported federal full faith and credit argument in its decision. [Petition Appendix C]. The appellate court focused solely on the propriety of class certification under Louisiana law, and reversed. *Id.*

Petitioners applied for review by the Louisiana Supreme Court. In their application and original briefs, petitioners again raised the *Willson* certification as a matter of comity, and used the phrase "full faith and credit" only in the context of the comity argument. [Plaintiffs'/Applicants' Original Application and Memorandum for Writ of Review at 15-17, and Brief Submitted On Behalf of Plaintiffs/Applicants at 5-7]. The Louisiana Supreme Court did not address any purported full faith and credit argument, but rather addressed the procedural issue of class certification pursuant to Louisiana law. [Petition Appendix B]. The Court concluded that the trial court had properly exercised its discretion in certifying a class.

On application by New York Life, the Louisiana Supreme Court granted rehearing and reversed its previous decision. The Court explained that class treatment was inappropriate pursuant to Louisiana procedural law because the number of individualized issues requiring individual adjudication demonstrated both an absence of "common character" and that class treatment was not the superior method of fair and efficient adjudication. [Petition Appendix A12]. Again, petitioners did not advance a federal full faith and credit argument, and the Louisiana Supreme Court did not address the issue. [*See* Opposition to Application of Respondent New York Life Insurance Company for Rehearing, Supplemental Brief of Plaintiffs/Applicants, and Petition Appendix A].

Petitioners then filed an application for a second rehearing in which for the very first time they raised whether, pursuant to the federal Full Faith and Credit Clause, the decision in *Willson* regarding an uncontested settlement class under New York procedural law bound

the Louisiana courts' determination regarding certification of a contested non-settlement class under Louisiana procedural law. [Application of Major Banks, *et al.* For Rehearing at 19]. In its summary denial of petitioners' application, the Louisiana Supreme Court did not address this belatedly raised federal full faith and credit argument.

REASONS FOR DENYING THE PETITION

I. This Court Does Not Have Jurisdiction To Entertain Plaintiffs' Petition

Plaintiffs concede that the jurisdiction of this Court for review of a purported federal question can only be invoked where that question was "clearly raised and articulated" in the courts below. [Petition for Writ of *Certiorari* at 9]. Here, review of plaintiffs' various submissions to and the decisions of the state courts, reveals that plaintiffs' full faith and credit argument (the sole basis of plaintiffs' petition to this Court) was neither adequately presented in the state system nor addressed in any manner by the state courts. Instead, throughout the proceedings and until a second application for rehearing to the Louisiana Supreme Court, plaintiffs did not invoke the Full Faith and Credit Clause of the United States Constitution. Indeed, it was only in the application for a second rehearing that plaintiffs referred to the United States Constitution itself, rather than merely to principles of comity[3] or judicial admissions, and only on that

[3] While full faith and credit sets forth the "minimum requirements which each state must observe when asked to

application did plaintiffs arguably raise a "full faith and credit" federal constitutional challenge to the decisions of the state courts.[4]

The proper exercise by this Court of jurisdiction over a state court judgment requires that the judgment involve a federal question that was properly pressed or passed upon by the state court. 28 U.S.C. § 1257(a).[5] "Ordinarily the federal issue is presented too late if it is first raised in a motion for new trial, is raised for the first time on appeal, is not presented with the clarity required by state appellate procedure, or is not advanced until a petition for rehearing addressed to the decision of the highest

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apply the law [or enforce judgments] of a sister state," *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953), the forum state's principles of comity may require deference beyond that minimum. *See Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995) ("[t]he doctrine of comity is based on 'respect for the sovereignty of other states or countries,' and under it 'the forum state will generally apply the substantive law of a foreign sovereign to causes of action that arise there' ").

[4] This fact is amply demonstrated by the plaintiffs' own Petition to this Court, and New York Life urges careful review of the quotations appearing on pages 4-6 of the Petition. For example, petitioners quote from their original brief to the Louisiana Supreme Court: "Likewise *principles of comity* require that the findings of the New York Court regarding class certification be given full faith and credit." [Petition for Writ of *Certiorari* at 6 (emphasis supplied)].

[5] Final decisions by highest state courts may be reviewed by *certiorari* when the validity of a federal treaty or statute, or of a state statute seen as repugnant to federal law, is "drawn in question," or when any title, right, privilege or immunity is "specially set up or claimed" under federal law. 28 U.S.C. § 1257(a).

state appellate court." 16B Wright, Miller, & Cooper, FEDERAL PRACTICE AND PROCEDURE § 4022 (2d ed. 1996); *see also Webb v. Webb*, 451 U.S. 493, 497 (1981).

This Court lacks jurisdiction to review the final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was *adequately* presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). Generalized attacks upon the validity of a holding or vague references to the Constitution are insufficient to warrant review. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988). When the highest state court does not discuss a federal issue, that omission is deemed to be due to lack of proper presentation. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). This Court will not decide issues that were advanced for the first time on a petition for rehearing in the court below, *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987), nor will it consider state court decisions involving federal constitutional issues raised for the first time on review. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *see also Mellon v. O'Neil*, 275 U.S. 212 (1927). Instead, " '[a]t the minimum . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.' " *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988) (*citing Webb v. Webb*, 451 U.S. 493, 501 (1981)).

Where a petitioner fails to raise a federal question until applying for rehearing to a state supreme court, as here, the federal question has not been raised sufficiently

to support review by this Court. It was for this very reason that the Court in *Exxon Corp v. Eagerton*, 462 U.S. 176 (1983), held that it had no jurisdiction to consider the preemption argument there advanced by petitioners. The *Exxon* Court noted that the record was devoid of any indication that the petitioners had raised the issue in the trial court. *Id.* at 181 n.3. Although the allegedly preempting federal statute at issue was discussed on rehearing before the state supreme court, that court did not pass on the issue. *Id.* Thus, this Court concluded, "[u]nder these circumstances we have no jurisdiction to consider whether the [federal statute] . . . preempted the application of the [state statute], . . . for it does not affirmatively appear that that issue was decided below." *Id.* Likewise, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-550 (1987), this Court concluded it had no jurisdiction because the "[a]ppellants did not present the [federal question] squarely to the state courts until they filed their petition for rehearing with the Court of Appeal," *id.*, and because the state courts did not address the federal question.

Petitioners may argue that their use of the words "full faith and credit" in briefs to the state courts sufficiently raised a federal question. Such an argument is without merit, however, as demonstrated by this Court's decision in *Webb v. Webb*, 451 U.S. 493, 495-496 (1981). *See also Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) (constitutional challenge to excessiveness of punitive damage award not sufficiently raised to support jurisdiction). There, the Court observed that "the petitioner did use the phrase 'full faith and credit' at several points in the proceedings below, [but] nowhere did she

cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution." *Webb*, 451 U.S. at 495-496. Moreover, the state courts did not address any federal question, prompting this Court to explain: "when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Id.*

Here, as in *Webb*, the state courts did not address the purported federal full faith and credit issue and, as in *Webb*, petitioners merely made vague references to "full faith and credit" in the context of their comity arguments. In addition, prior to their application for a second rehearing before the third court to consider certification, petitioners did not cite to the Constitution or to any cases relying on the Constitution. Thus, as in *Webb*, the federal full faith and credit issue was not sufficiently raised before the state courts.

While petitioners here did invoke the federal Full Faith and Credit Clause in the application for a second rehearing, the Louisiana Supreme Court did not pass on the issue. Indeed, there would have been no basis for the Louisiana Supreme Court to address this newly asserted argument since that issue had never been presented sufficiently in or addressed by the lower state courts: The Louisiana Supreme Court itself has no appellate jurisdiction to address and decide issues raised before it but not ruled upon by the trial court. *Twin Parish Port Comm'n v. Berry Bros., Inc.*, 94-2594 (La. 2/20/95), 650 So. 2d 748, *writ denied*, 95-2665 (La. 1/5/96), 666 So. 2d 288. As a result, this Court lacks jurisdiction to entertain petitioners'

full faith and credit challenge, and the Petition for Writ of *Certiorari* should be denied.

II. Plaintiffs' Purported Full Faith and Credit Challenge Is Without Merit and Unworthy of Review

A full faith and credit determination involves a two-step inquiry. First, a court must determine whether the type of judgment in question would have preclusive effect under the law of the state that rendered the initial judgment. *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 375 (1996). If the answer to that inquiry is in the affirmative, a court must next consider if there exists a valid basis for collateral attack of that decision. The full faith and credit argument advanced by plaintiffs fails the first prong of this test, obviating the need to consider the second.

A. *Willson* Certification Is Not *Res Judicata* Because Identity of Parties Is Absent

Contrary to plaintiffs' argument, it is clear that New York courts would find that the *Willson* judgment does not render class certification in this case *res judicata*. For *res judicata* to apply under New York law, there must be an identity of parties in both proceedings. *New York State Dormitory Authority v. Board of Trustees of Hyde Park Fire and Water Dist.*, 239 A.D. 2d 502, 657 N.Y.S. 2d 444, 445 (N.Y. App. 1997); Restatement of Judgments Second § 34(3). Indeed, petitioners themselves declare that "[u]nder New York law, 'The doctrine of *res judicata* precludes litigation of matters that could or should have

been raised in a prior proceeding *between the parties.*' " [Petition for Writ of *Certiorari* at 19 (emphasis added; citations omitted)]. The New York court in *Willson*, however, specifically afforded petitioners the right to opt out of its proceedings so that they might avoid the application of *res judicata* and pursue their claims elsewhere. Petitioners availed themselves of that right and opted out. Thus, they were not parties to the *Willson* proceeding and *res judicata* (or claim preclusion) does not apply. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979); Restatement of Judgments Second § 34(3).

B. Certification in *Willson* Has No Collateral Estoppel Effect Here

Presuming that plaintiffs' Petition can be read to advance an argument based on issue preclusion or collateral estoppel, such an argument is likewise untenable. The first of two requisites under New York law for application of collateral estoppel does not exist: there is no identity of issues. *Kaufman v. Eli Lilly and Co.*, 65 N.Y. 2d 449, 482 N.E.2d 63, 492 N.Y.S. 2d 584 (N.Y. 1985). Identity is lacking because (1) class certification was not actually litigated and adjudicated in *Willson*, and (2) class certification here and in *Willson* rest on the application of distinct procedural rules in markedly different situations. *Halyalkar v. Board of Regents*, 72 N.Y. 2d 261, 527 N.E. 2d 1222, 532 N.Y.S. 2d 85 (N.Y. 1988).

1. Identity of Issues Is Absent Because Certification in *Willson* Was Not Actually Litigated

Under the New York law of collateral estoppel, there is no identity of issues if, as here, the matter sought to be precluded was not contested in the prior proceeding. *Kaufman v. Eli Lilly and Co.*, 65 N.Y. 2d 449, 456, 482 N.E. 2d 63, 67, 492 N.Y.S. 2d 584, 589 (N.Y. 1985); *Halyalkar v. Board of Regents*, 72 N.Y. 2d 261, 267, 527 N.E.2d 1222, 1225-26, 532 N.Y.S. 2d 85, 89-90 (N.Y. 1988). In *Kaufman*, for example, the New York Court of Appeals found that, although the legal and factual issues in two matters were essentially the same, there was no identity for collateral estoppel purposes because the defendant had not challenged application of the legal theory in the first proceeding. As the Court explained, "[a]n issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation." *Kaufman v. Eli Lilly and Co.*, 65 N.Y. 2d 449, 456-57, 482 N.Ed. 2d 63, 67, 492 N.Y.S. 2d 584, 589 (N.Y. 1985).

Likewise, in *Halyalkar*, the New York Court of Appeals held that "the first [collateral estoppel] requirement – identicality of the issue – was not satisfied," *Halyalkar v. Board of Regents*, 72 N.Y. 2d 261, 266, 527 N.E. 2d 1222, 1224-25, 532 N.Y.S. 2d 85, 88 (N.Y. 1988), and refused to accord collateral estoppel effect to a prior administrative order because that order had not been contested and the issues therefore had not actually been litigated or determined. *Id.*, 72 N.Y. 2d at 267, 532 N.E. 2d at 1225, 532 N.Y.S. 2d at 88-89. As the Court noted, the

rule against according collateral estoppel effect to uncontested matters "is founded on considerations of fairness and recognizes that if preclusive effect were given to issues not truly adjudicated the result would be to discourage compromises and to accord them consequences which the parties neither intended or foresaw." *Id.*, 72 N.Y. 2d at 267, 527 N.E. 2d at 1226, 532 N.Y.S. 2d at 89.

The reasoning of *Halyalkar* and *Kaufman* informs the result here. The *Willson* ruling was based upon a stipulated settlement between New York Life and the *Willson* class representatives, pursuant to which New York Life did not contest certification. Class certification in *Willson* was not actually litigated or adjudicated, and therefore *Willson* can have no preclusive effect here.

2. Identity Of Issues Is Absent Because *Willson*, Unlike Here, Addressed Application of New York Procedural Law To A Settlement Class

Collateral estoppel also cannot apply because the class certification issues before the *Willson* court were substantially different from those presented here. *Balcerak v. County of Nassau*, 1999 N.Y. LEXIS 3927 (N.Y. Dec. 16, 1999). Not only do the two proceedings involve the application of the distinct procedural laws of two different states, but the underlying factual issues are markedly different since *Willson*'s findings rested heavily upon the terms of the class settlement before it.

A simple comparison of the New York and Louisiana class certification statutes shows that their provisions are not identical. *Compare* N.Y. C.P.L.R. § 901 *with* former La.

Code Civ. Pro. art. 591.[6] The New York rule "is a synthesis of the provisions of Rule 23(a)(1) and (b)(3) of the Federal Rules of Civil Procedure." 3 Weinstein, Korn, & Miller, *New York Civil Practice – CPLR* ¶ 901.11 (1999). In contrast, former Louisiana Code of Civil Procedure article 591 required a showing of " 'common character' among the rights of the representatives of the class and the absent members of the class." Thus, while Louisiana courts may accord persuasive authority to Federal Rule of Civil Procedure 23 and interpretive federal case law, they have not hesitated to diverge from it. *See, e.g., CitiCorp Person-to-Person Financial Center, Inc.*, 409 So. 2d 391, 393 (La. App. 4th Cir. 1982) (refusing certification, noting that "[t]o this extent, the criteria of revised Federal Rule 23 has been rejected by our legislature"). As explained by one court, the Louisiana class action rules are "not as explicit or inflexible as the federal rules," and have been developed in "an evolutionary case-by-case [manner] wherein guidelines have been suggested without the imposition of a concretized procedure." *Livingston Parish Policy Jury v. Illinois Cont. Gulf R. Co.*, 432 So. 2d 1027, 1029 (La. App. 1st Cir. 1983). Petitioners' effort to minimize the distinctions between New York law and the applicable Louisiana law by arguing that both are identical to Federal Rule of Civil Procedure 23 is of no avail.

Such distinctions between the law applied in the prior proceeding and the law applicable to the present proceeding demonstrate a lack of identity of issues and

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[6] Louisiana Code of Civil Procedure article 591 was revised in 1997, after this proceeding commenced. Former article 591 applies in this case. Petition Appendix A8 at n.8.

prevent application of collateral estoppel under New York law. *Balcerak v. County of Nassau*, 1999 N.Y. LEXIS 3927, *5 (N.Y. Dec. 16, 1999). In *Balcerak*, for example, an injured corrections officer obtained a favorable judgment from the New York Workers Compensation Board based on its finding that his injury was work-related. In a subsequent proceeding for additional benefits pursuant to another statute, he advanced the earlier judgment as conclusive proof that he was "injured in the performance of his duties." *Id.* The Court of Appeals, however, noted that although the statutes used similar "operational phrases," the language was not necessarily " 'interchangeable' ." *Id.* The Court therefore rejected application of collateral estoppel, finding that eligibility for benefits under the two statutes "should . . . stand and be resolved essentially on their own merits." *Id.* at *8. Likewise, class certification determinations pursuant to the distinct procedural laws of two different states "should . . . stand and be resolved essentially on their own merits."

Acceptance of petitioners' argument essentially would require Louisiana courts to apply the procedural rules of another state. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) ("[s]ince the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts"). Such a result would deny Louisiana the "legislative jurisdiction to which [it is] entitled." *Id.* at 727. In the context of procedural matters, including class certification, the decision of a court in one state should have no preclusive effect in

a different jurisdiction, which is free to impose different procedural standards.

Thus, courts have refused to accord preclusive effect to class certification orders made pursuant to the laws of other jurisdictions. For example, in *Cullen v. Margiotta*, 811 F.2d 698, 732-33 (2d Cir.), *cert. den.*, 483 U.S. 1021 (1987), the federal court refused to give preclusive effect to the prior denial of class certification by a New York state court. In rejecting the defendants' assertion that collateral estoppel precluded maintenance of a class action, the court in *Cullen* explained that there is no identity of issues "when the standards governing [the issues] are significantly different." *Id.* at 732. Similarly, in refusing to enjoin class certification in a subsequent and virtually identical proceeding brought in Texas state court, the federal court in *J.R. Clearwater, Inc. v. Ashland Chemical Co.*, 93 F.3d 176, 180 (5th Cir. 1996), noted that the discretionary nature of class certification "dictates that each court – or at least each jurisdiction – be free to make its own determination in this regard."

Likewise, in *Morgan v. Deere Credit, Inc.*, 889 S.W.2d 360, 367-69 (Tex. Ct. App. 1994), the Texas court rejected the argument that a previous federal district court decision certifying a permissive class under Federal Rule of Civil Procedure 23(b)(3) rather than a mandatory class under Federal Rule 23(b)(1) required that it also reject a mandatory class and certify a permissive class under the Texas Rules of Civil Procedure. Even though Texas Rules of Civil Procedure 42(b)(1) and (2) and Federal Rules of Civil Procedure 23(b)(1) and (2) are identical in terminology, the court found no identity of issues, explaining that "[n]ot only is there a difference in some of the rules, those

rules that are identical sometimes have been applied differently by Texas courts." *Id.* at 367-68; *see also In re Michael Lebner*, 197 B.R. 180, 188 (D. Mass. 1996) (refusing to accord preclusive effect to prior class certification by Massachusetts state court). Louisiana state courts should likewise be free to construe and apply their own procedural rules without being bound to New York procedural rules as construed by a New York state court.

Moreover, the context in which the *Willson* certification was decided is markedly different than the situation presented here. The *Willson* court's certification rested heavily on the existence of the settlement and its alternative dispute resolution provisions;[7] here, in contrast, there is neither a settlement nor alternative dispute resolution procedures for the adjudication of the many individualized issues that formed the basis of the Louisiana Supreme Court's denial of certification. Instead, there is a full evidentiary record, arising from a hotly contested certification hearing, which demonstrates great disparity among plaintiffs and a myriad of highly individualized issues.

Plaintiffs erroneously rely on this Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), in an attempt to equate this case with the settlement class certified in *Willson*. *Amchem Products*, however, does not affect the crucial distinctions between *Willson* and this case. First, *Willson* was decided in 1995, prior to the ruling in *Amchem Products*, and it would be improper to

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[7] As demonstrated on pages 1-3, *supra*, the *Willson* court expressly relied on the settlement and its terms in certifying a class.

measure its ruling by a standard that did not exist in New York at the time. Indeed, *Amchem Products* expressly recognized that many courts had long held "that settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements." *Id.* at 618. Further, *Amchem Products* addressed the findings necessary for certification of a settlement class under federal procedure, not under state rules such as those applied in *Willson*.

Additionally, even in clarifying that a settlement class must meet the legal requirements for certification, *Amchem Products* did not entirely eliminate consideration of a settlement from class certification analysis. "[S]ettlement is relevant to a class certification. . . . Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Id.* Here, unlike *Willson*, no settlement eliminates the "intractable management problems" presented by petitioners' proposed class.[8]

Finally, petitioners' effort to use the *Speaks* proceeding to support their full faith and credit argument is unavailing. The *Speaks* court merely stayed its proceeding as a matter of comity as to those members of the *Speaks*

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[8] Interestingly, plaintiffs seek to use the *Willson* order certifying a class while simultaneously rejecting the findings underlying that same order. For example, plaintiffs ignore the *Willson* holding that class certification was only appropriate "[g]iven the settlement, and specifically its Alternative Dispute Resolution component." [Petition Appendix E24 at ¶ 31].

purported class who had not opted out of *Willson*, which at that time was still pending final determination. Nothing about that court's decision demonstrates any error in the Louisiana Supreme Court's subsequent decision against certifying a class of *Willson* opt-outs in this case.

CONCLUSION

As a preliminary matter, this Court need not consider the merits of plaintiffs' Petition: the purported federal principle that forms the sole basis for that Petition was not adequately raised in or addressed by the state courts below. This Court therefore has no jurisdiction to entertain this Petition pursuant to 28 U.S.C. § 1257(a).

Should this Court nonetheless determine jurisdiction is present, the issues raised by plaintiffs do not merit consideration. The Louisiana Supreme Court properly applied Louisiana procedural class certification rules, and the Full Faith and Credit Clause of the United States Constitution requires no different result. Moreover, the New York courts would not accord to the *Willson* certification the preclusive effect advocated by plaintiffs. Certification in *Willson* was uncontested and therefore was not "actually litigated and determined," and the identity of issues between *Willson* and this case, required for

application of collateral estoppel, does not exist. Plaintiffs' Petition should be denied.

Respectfully submitted,

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